FOO LOKE YING & ANOR.

v.

TELEVISION BROADCASTS LTD. & ORS.

SUPREME COURT, KUALA LUMPUR
ABDUL HAMID OMAR CJ (MALAYA)
HASHIM YEOP SANI SCJ
EUSOFFE ABDOOLCADER SCJ
[CIVIL APPEAL NO. 133 OF 1985]
23 MAY 1985

COPYRIGHT: *Cinematograph films - First publication in Hong Kong - Publication within 30 days in Malaysia - Whether copyright conferred on said films.*

The first respondent is a limited company incorporated in Hong Kong and are the makers and owners of the copyright in certain cinematograph films in Hong Kong; the second and third respondents being its licensee and sub-licensee respectively in Malaysia. The appellants had sought a declaration that the first respondent was not entitled to copyright in this country in respect of cinematograph films produced by it in Hong Kong and consequential injunctive relief and damages. Their claim was dismissed and they now appeal against that decision.

The contention of the appellants is that ss. 5 and 6 of the Copyright Act 1969 ("the Act") must be read together with the result that copyright can only accrue in this country in relation to citizens of or permanent residents or bodies incorporated in Malaysia.

Held:

[1] The whole case turns on a question of statutory construction. Section 5,6 and 7 of the Act operate each in accordance with its specific provisions to confer copyright on every work eligible for copyright in the circumstances specified in the respective sections.

[2] The marginal notes to ss. 5 and 6 make it abundantly clear that they are distinct provisions to be read separately and they operate independently of each other.

[3] Further, s. 5(2) prescribes the periods for the subsistence of the copyright conferred by that section and s. 6(2) adopts the same duration. If ss. 5 and 6 are to be read conjunctively, s. 6(2) would be wholly unnecessary and redundant. Parliament does nothing in vain and a Court is not at liberty to treat words in a statute as mere tautology unless they are wholly meaningless.

[4] The words "and which has not been the subject of copyright conferred by s. 5 of this Act" appearing after paragraph (d) of s. 6(1) is intended to apply and qualify all the four para. (a) to (d) of that subsection.

[5] In the instant matter publication in Malaysia took place within a period of 30 days of the earlier publication in Hong Kong and s. 6(1)(a) would operate to confer copyright on the films in question.

[Appeal dismissed with costs.]

Cases referred to:

Bushell v. Hammond [1904] 2 KB 563
Reg. v. Schildkamp [1971] AC 1
Quebec Railway, Light, Heat and Power Co. Ltd. v. Vandry [1920] AC 662
Enmore Estates Ltd. v. Darsan [1970] AC 497
Asia Television Ltd. & Anor. v. Viwa Video Sdn. Bhd. [1984] 2 MLJ 304; [1984] 1 CLJ (Rep) 72

South West Water Authority v. Rumble's [1985] 2 WLR 405
Escoigne Properties Ltd. v. Inland Revenue Commissioners [1958] AC 549
Katikiro of Buganda v. Attorney-General [1961] 1 WLR 119
Hadmor Productions Ltd. v. Hamilton [1983] 1 AC 191
Salomon v. Commissioners of Customs and Excise [1967] 2 QB 116
Winfat Enterprise (HK) Co. Ltd. v. Attorney-General of Hong Kong [1985] 2 WLR 786
Seaford Court Estates Ltd. v. Asher [1949] 2 QB 481

Legislation referred to:
Copyright Act 1969, ss. 2(1), 2(2)(c), 3, 4, (1), 5, (1), (2), 6, (1), (1)(a), (2), 7, 12, (1),(2), 20

For the appellants - N.T. Rajah; M/s Maxwell, Kenion, Cowdy & Jones
For the respondents - V.L. Kandan (S.F. Wong with him); M/s Shearn Delamore & Co.

JUDGMENT

Eusoffe Abdoolcader SCJ:

The sole and primal issue arising for resolution in these proceedings as agreed between the parties is whether the first respondent which makes cinematograph films in Hong Kong acquires copyright in Malaysia under any of the provisions of the Copyright Act, 1969 by virtue of the first publication thereof in Malaysia, and this in effect involves and entails the construction of the requisite provisions of the Copyright Act ("the Act"). To avoid tautology, all references to statutory provisions in this judgment relate to the Act.

The case in the Court below was presented on the basis of a statement of agreed facts, briefly, to this effect: The first respondent is a limited company incorporated in Hong Kong and 'are the makers and owners of the copyright in certain cinematograph films in Hong Kong', the second and third respondents being respectively its licensee and sub-licensee in this country, and the films in question are video recordings to be shown on television screens for which purpose they are copied on to tapes for sale and hire as video cassettes. These films are published in Malaysia within thirty days of their publication in Hong Kong which is accepted as the first publication thereof. The appellants in a representative action suing on behalf of themselves and other members of the Perak Video Tape Dealers Association issued a writ on 20 October 1984 seeking a declaration that the first respondent is not entitled to copyright in this country in respect of cinematograph films produced by it in Hong Kong and consequential injunctive relief and damages. V.C. George J, in a careful and considered reserved judgment dismissed the appellants' claim on 2 March 1985 and they now appeal against that decision.

To epitomize the pertinent provisions of the Act: Section 3 provides that no copyright shall subsist otherwise than by virtue of the Act and s. 4 enumerates the works eligible for copyright. Section 5(1) confers copyright on every work eligible for copyright of which the author is a qualified person, *scilicet*, a citizen of or a permanent resident in Malaysia or a body corporate constituted and established in Malaysia. Section 6(1) confers copyright on every work eligible for copyright referred to therein which meets the specified requirements in relation to its publication, location, manufacture or transmission, and for the purposes of this judgment the pivotal provision is para. (a) thereof in respect of a literary, musical or artistic work or cinematograph film first published in Malaysia. *Anent* the matter of publication s. 2(2) enacts provisions for the purposes of the Act with respect to publication and the cardinal provision for consideration in the instant matter is para. (c) of that subsection which stipulates that a publication in any country shall not be treated as being other than the first publication by reason only of an earlier publication elsewhere, if the two publications took place within a period of not more than thirty days.

Another provision in the Act, the effect of which is in issue, is s. 20 which empowers the Minister charged with the responsibility for trade and industry to make regulations extending the application of the Act in respect of any or all of the works referred to in s. 4(1) to persons, corporations and works as specified therein in relation to a country which is a party to a treaty or a member of any convention or union to which Malaysia is also a party or a member as the case may be and which provides for protection of copyright in works which are protected under the Act.

The contention advanced by and for the appellants, basically, is that, predicated on the factuality of s. 20, ss. 5 and 6 must be read together, that copyright can only accrue in this country in relation to citizens of or permanent residents or bodies incorporated in Malaysia and that therefore s. 6 can only apply if the author of an eligible work is a citizen of or a permanent resident in or a corporation constituted and established in Malaysia. Furthermore, with regard to the question of publication under s. 6(1)(a), Mr. Rajah for the appellants submits that the functional operation of s. 2(2)(c) is dependent on the implementation of s. 20 and that the provisions of s. 2(2)(c) are ambiguous as the words 'any country' in that paragraph might mean Malaysia or they might just as well exclude Malaysia, and indeed he goes on to declare that he frankly does not know what they actually mean.

Before turning however to consider and examine the propositions urged for the appellants, we should perhaps touch on what Mr. Rajah sought to take at the outset as a preliminary point as to whether video tapes are in fact cinematograph films. This point was never taken at any time or at any stage and was never in issue until it was raised before us, and it would appear to be clearly an afterthought, and a very recent one at that, perhaps broached now for the first time as a secondary line of attack for good measure, as in the statement of agreed facts it is expressly agreed that the subject matter and the copyright in issue all pertain to cinematograph films. Mr. Rajah, however, only faintly raised this point to draw our attention to it, as he put it, conceding that he was not pressing it, and indicated that he was prepared to leave the matter to the definition of 'cinematograph film' in the Act.

Since the point has however been raised we need only say that in our view video tapes come plumb within the definition of 'cinematograph film' in s. 2(1) as the first fixation of any sequence of visual images on material of any description (whether translucent or not) so as to be capable, by use of that material, (a) of being shown as a moving picture, or (b) of being recorded on other material (whether translucent or not) by the use of which it can be so shown, and it includes the sounds embodied in any associated sound track. The definition does not require that the visual images should be in a state ready for projecting in order to qualify as a cinematograph film and it would be enough that they be recorded on any material, translucent or otherwise, and that it should be possible to translate them into a moving picture - a conclusion evident even without having recourse to the *reddendo singula singulis* canon of construction, *scilicet*, that words should be read distributively. Films for television purposes often consist of video tapes which are records on tape of electrical impulses, that is to say, by the use of magnetic impulses, the light images are recorded on magnetic tape which can afterwards be used to produce a moving picture. The definition of 'cinematograph film' in s. 2(1) makes no reference to cinematography or any other process, but concentrates chiefly on the essential characteristic of a sequence of visual images capable of being shown as a moving picture. So much then for this digression into the nature and characterization of video tapes.

We now advert to an examination of the relevant provisions of the Act in the light of the contentions urged on behalf of the appellants. Sections 5, 6 and 7 operate each in accordance with its specific provisions to confer copyright. We have previously referred to ss. 5 and 6 and would only add, briefly, that s. 7 confers copyright on works of Government and international bodies. It will be noted that each of these sections provides that 'copyright shall be **conferred'** and it goes on in each case to say **'by this section'** on **'every** work eligible for copyright' in the circumstances specified. Section 6 does not refer to the author of the work at all. Where copyright is conferred by ss. 5, 6 and 7 then the vesting of the copyright in specifying the first ownership thereof is provided for by s. 12, vesting it in the case of ss. 5 and 6 initially in the 'author' as defined in s. 2(1) read with the provisions of s. 12(1), with a distinct and separate provision in s. 12(2) in relation to copyright conferred under s. 7. It will be seen that in providing for the vesting of copyright s. 12(1) specifically refers to ss. 5 and 6 disjunctively.

To consider the inter-relationship if any between ss. 5 and 6 in the context of the appellants' argument, it might perhaps be useful to refer to the marginal notes to these two sections. A side note or marginal note to a section is part of the statute. It may be considered in construing the section or any other provision of the statute, provided due account is taken of the fact that its function is merely to serve as a brief guide to the content of the section. Collins MR in *Bushell v. Hammond* [1904] 2 KB 563 took the approach that the marginal note, while forming no part of the section, was of some assistance as it showed the drift of the section. In *Reg. v. Schildkamp* [1971] AC 1**,** Lord Reid and Lord Upjohn took the view that the marginal or side note will rarely be of any use in interpreting a statute but that they should not be rejected completely as aids, the former putting this (at p. 10) on the basis that it is the whole statute that is the product of the legislature and that therefore the whole statute can be looked at if any doubt should arise as to its meaning.

The marginal note to s. 5 reads 'Copyright by virtue of citizenship or residence' and that to s. 6 'Copyright by reference to country of origin'. It is therefore abundantly clear that they are distinct provisions to be read separately and operating independently of each other in the light of the opening provisions of each of these sections we have adverted to. If as is contended they have to be read conjunctively then the whole scheme thereby created must necessarily be spurious and be looked at askance in view of the provisions of s. 7 and the specific enactment in sub-section (4) of that section providing that ss. 5 and 6 shall not be taken to confer copyright on works to which s. 7 applies. We should pause to observe that s. 7(4) too specifically refers to ss. 5 and 6 as distinctive provisions.

Section 5(2) prescribes the periods for the subsistence of copyright conferred by that section, and s. 6(2) adopts the same duration as is provided for in s. 5 in respect of copyright conferred by s. 6 in relation to the same type of work. Now if ss. 5 and 6 are indeed intended to be read conjunctively, quite apart from the fact that there would be no reason why they could not have been enacted together as a composite section, s. 6(2) would be wholly unnecessary and redundant. The Court however is not at liberty to treat words in a statute as mere tautology or surplusage unless they are wholly meaningless. On the presumption that Parliament does nothing in vain, the Court must endeavour to give significance to every word of an enactment, and it is presumed that if a word or phrase appears in a statute, it was put there for a purpose and must not be disregarded. In *Quebec Railway, Light, Heat and Power Co. Ltd. v. Vandry* [1920] AC 662, Lord Sumner in delivering the judgment of the Judicial Committee said (at p. 676):

> Secondly, there is no reason why the usual rule should not apply to this as to other statutes - namely, that effect must be given, if possible, to all the words used for the legislature is deemed not to waste its words or to say anything in vain.

The Judicial Committee applied and followed this case in *Enmore Estates Ltd. v. Darsan* [1970] AC 497 (at p. 506).

Section 5 does not postulate publication as a prerequisite to its operation and s. 6 on its ordinary meaning clearly provides for situations not covered by s. 5. The absence of any nexus or interaction between ss. 5 and 6 would in our view appear to be as clear and evident as that we found between the Act and the Films (Censorship) Act, 1952 in *Asia Television Ltd. & Anor. v. Viwa Video Sdn. Bhd.* [1984] 1 CLJ (Rep) 72. This is substantiated by the fact that if the appellants are correct in their contention, then s. 6(1) would again be mere surplusage for the purposes of acquisition of copyright, as s. 5 would have operated previously in the first instance to confer it, since s. 5 confers copyright on **every** work eligible for copyright of which the author is a qualified person as defined in s. 5(1).

One further point: Paragraph (d) of s. 6(1) which refers to a broadcast transmitted from Malaysia is followed by a qualification and which has not been the subject of copyright conferred by s. 5 of this Act'. Although as a matter of printing there does not appear to be a space between para. (d) and the sentence we have referred to, we would think that the parenthesis in question which appears after para. (d) of s. 6(1) is intended to and does in fact apply to and qualify all the four para. (a) to (d) of that subsection, and this is borne out by the marginal note and the provisions of sub-section (2) of s. 6. Even if however it qualifies only para. (d) of s. 6(1) it would still clearly negate any suggestion that ss. 5 and 6 are to be read together as it would deprive the provisions of that paragraph of any sense if we accept the appellants' contention, as on the premise of their argument there can be no question of the work referred to in para. (d) not also being the subject of copyright conferred by s. 5.

We should perhaps reiterate that the starting point in statutory interpretation is to consider the ordinary meaning of the word or phrase in question, that is its proper and most known signification. Some three months ago Lord Scarman in delivering the leading judgment of the House of Lords in *South West Water Authority v. Rumble's* [1985] 2 WLR 405 said (at p. 411):

> ... the language of the two paragraphs consists of ordinary English words which possess by their very imprecision the flexibility which is the hallmark of the English language, and which is one of the reasons for the survival of English as a living and worldwide tongue. I have no doubt that it would be contrary to the legislative purpose of the enactment to restrict or refine their breadth and flexibility in the context of this legislation, which has to cover a wide range of circumstances and situations present and future. A restrictive interpretation of the legislature's language would defeat the broad purpose of this innovative and reforming statute.

We are of the view that the provisions of the Act under consideration before us call for a purposive and literal construction which is one which follows the literal meaning of the enactment where that meaning is in accordance with the legislative purpose and applies where the literal meaning is clear and reflects the purposes of the enactment. We can in the circumstances we have discussed see no justification or warrant to read the provisions of ss. 5 and 6 together so as to restrict the application of s. 6 only to works eligible for copyright as specified therein of which the author is a qualified person as defined in s. 5. The provisions of the Act are abundantly clear to refute any resort to a purposive and strained construction which requires a strained meaning where the literal meaning is not in accordance

with the legislative purpose. In *Reg. v. Broadcasting Complaints Commission, Ex parte Owen* The Times, 26 January 1985, it was held that the converse is not correct, namely, that it is legitimate to adopt a purposive construction so as to prevent the application of a statute to a situation which on its purely literal construction it would apply. This is what we think the appellants are seeking to persuade the Court to do.

We now turn to the argument for the appellants that s. 2(2)(c) is ambiguous and that in the absence of the implementation of the provisions of s. 20 there is no qualifying country to which s. 2(2)(c) could or would apply. We do not think that there is any warrant to construe s. 2(2)(c) so as to make its operation dependent upon the implementation of s. 20. We are unable to see how the implementation *vel non* of the provisions of s. 20 can affect or alter the ordinary and natural connotation of the other provisions of the Act. The distinction between motive and intention in respect of a legislative measure is that the former relates to the policy for the enactment of the legislation in that way at that time for that purpose and the latter relates to the legal meaning of the enactment. The Court is concerned with motive only to the extent that it may throw light on intention. It is the legal meaning of the enactment that in the end matters to the Court, not the reason why it was passed.

Mr. Rajah seeks to refer to the explanatory statement to the Bill which later was enacted as the Act and which makes reference to two international conventions on copyright. We need only say it is not generally permissible to refer to the explanatory statement for purposes of statutory interpretation (*Escoigne Properties Ltd. v. Inland Revenue Commissioners* [1958] AC 549 at p. 566); *Katikiro of Buganda v. Attorney-General* [1961] 1 WLR 119 where the Judicial Committee refused to look at a White Paper; *Hadmor Productions Ltd. v. Hamilton* [1983] 1 AC 191 (at p. 232)]. It is also not permissible to report to the terms of any international convention or treaty if there should be any ambiguity in a statute and aid were needed to construe it unless the latter was patently intended to carry out the terms of the convention or treaty, which is not the case here (*Salomon v. Commissioners of Customs and Excise* [1967] 2 QB 116). We should perhaps also refer to the decision of the Privy Council some two months ago in *Winfat Enterprise (HK) Co. Ltd. v. Attorney General of Hong Kong* [1985] 2 WLR 786 in which the question arose as to the effect of certain Hong Kong Ordinances relating to tenure of land ceded to the British Crown under the Peking Convention of 1898 between the Emperor of China and the British Crown, when Lord Diplock in delivering the judgment of the Judicial Committee said (at p. 792):

> The relevant Ordinances are unambiguous and their Lordships agree with the Courts below that there is no ground for recourse to the principle of *Salomon v. Commissioners of Customs and Excise* [1967] 2 QB 116 in an attempt to construe their unambiguous words so as to give effect to some guess, for it can be no more, as to what was intended by the respective sovereigns to be meant by the paragraph in the Convention which their Lordships have already cited.

We can see no ambiguity in s. 2(2)(c), and on the provisions of the Act as they now stand 'any country' must necessarily mean Malaysia and would include any other qualifying country to which the Act is extended under the provisions of any regulations if and when made under s. 20. In the matter before us there was publication in Hong Kong in the first instance, and upon publication in Malaysia within a period of thirty days of the earlier publication in Hong Kong within the intendment of s. 2(2)(c), the provisions of s. 6(1)(a) would operate to confer copyright on the films in question. The first respondent as the author is accordingly vested under s. 12 with copyright in respect thereof.

As we have stated at the outset the whole case turns on a question of statutory construction. In *Seaford Court Estates Ltd. v. Asher* [1949] 2 QB 481 Denning LJ said (at p. 499):

> A judge must not alter the material of which it (the prescript) is woven, but he can and should iron out the creases.

What we are however asked to do in this case is not to iron out any creases (and there are none in any event perceptible in the Act) but to replace the material of the Act with linen of the appellants' choice, which is certainly not the business of the Court. Any such exercitation would mutate and indeed mutilate the intention of the legislature and amount to unwarranted judicial transgression into the legislative domain. To accept the submissions put to us on behalf of the appellants would be to countenance in the realm of statutory construction a free-for-all like the aftermath of an English football match.

We accordingly at the conclusion of argument for the reasons we have discussed dismissed this appeal with costs and directed the deposit lodged in Court by way of security to be paid out to the respondents.

Also found at [1985] 1 CLJ 511